SUPREME COURT, U. S.

Supreme Court, U. S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1272

AIDA GUZMAN DE FONT, ET AL.,
PETITIONER,

v.

UNITED STATES OF AMERICA, ET AL.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA, ET AL.,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered in the above entitled case on January 6, 1972.

Opinion Below

The judgment of the District Court was entered on March 5, 1971. The judgment of the Court of Appeals for the First Circuit was entered on January 6, 1972 and is annexed hereto as Appendix A commencing at page 9.

The judgment of the District Court is annexed hereto as Appendix B commencing at page 12.

Jurisdiction

The judgment of the Court of Appeals for the First Circuit was made and entered on January 6, 1972, and petitioner requested an order retaining the mandate on January 26, 1972. Said mandate was issued on January 26, 1972. The jurisdiction of this Court is invoked under 28 USC section 1254 (1) and Rule 19(1)(b) of the Supreme Court Rules.

Questions Presented

1. Whether injuries received by petitioners not members of the Armed Forces are to be compensated on the part of the plaintiff.
2. Whether as a matter of substantive law it was error for the Court of Appeals to affirm a dismissal on an important question of federal law which has not been decided.

Statutes Involved

Federal Tort Claims Act 28 USCA
Section 2674

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Rule 19(1) (b) of the Supreme Court Rules.

1. A review on writ of certiorari is not a matter of

right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

> (b) "Where a Court of Appeals . . . . has decided an important question of federal law which has not been, but should be, settled by this Court; or has decided a federal question in a way in conflict with applicable decisions of this Court . . . ."

Statement of the Case

This is a petition for certiorari brought after an appeal from the United States District Court for the District of Puerto Rico was filed and, upon consideration by the United States Court of Appeals for the First Circuit, was affirmed on January 6, 1972 dismissing the complaint under the Federal Tort Claims Act.

The circumstances of this case reveals that in October 1966, Jacinto Font Carrion was inducted into the Army. While on military service he underwent medical treatment in various Army medical institutions and was eventually discharged. In the month of March 1968, in the Clinical Research Center of the University of Puerto Rico Hospital, Rio Piedras, Puerto Rico, he died.

The treatment, evaluation and medical care given to the deceased by the various Army physicians and hospital institutions was deficient and negligent. The Petitioner, Aida Guzman de Font, herself a physician was present throughout most of the treatment given and witnessed and suffered the consequences of the inadequate care given to her husband.

On November 12, 1970, Aida Guzman de Font, for her-

self and as mother with patria potestas of minor Jackeline Font Guzman filed a complaint under the Federal Tort Claims Act, 28 USC section 2671, et seq.

The complaint alleged that because of the inadequate and negligent treatment witnessed by the Petitioner, she and her daughter suffered great anguish and mental disorder, the loss of companionship and the loss of the husband's ability to produce income and support. Said loss and damages were calculated in the amount of $884,000.00.

Simultaneous with the filing of a motion to dismiss, Defendant-Respondent also filed a memorandum in support of Defendant's motion to dismiss complaint.

Thereafter, the Petitioner filed Notice to Appeal to the Court of Appeals for the First Circuit after the District Court found Respondent's motion to dismiss well taken and decreeing on March 5, 1971 the dismissal of the complaint. (A. B, p. 13). The Court of Appeals, based upon the same decisions as the District Court, affirmed the judgment below on a Per Curiam decision dated January 6, 1972 (A. A, p. 11)

Reasons for Granting the Writ

The decision by the Court below in the case at bar was rendered on the basis of the Doctrine of *Feres* v. *United States,* 340 US 135 (1950) which stated that an action cannot be maintained for service-connected injuries or death. This opinion involves an important question of federal law which has not been, but should be settled by the Supreme Court of the United States.

The Federal Tort Claims Act, the statutory provision which governs this case, provides that the United States shall be liable, respecting the provisions of the title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances (28 USCA

section 2674). This section supplements section 1346(b) of the same title which states that a District Court shall have exclusive jurisdiction of civil action claims against the United States for injuries caused by the negligent act of any employee while acting within the scope of his employment.

The primary purpose in enacting the Federal Tort Claims Act was to extend a remedy in tort to those who were without remedy against the sovereign. The Courts have added that since military personnel can avail themselves to a comprehensive system of compensation, it was the Court's opinion that the provisions of this act were not applicable to servicemen.

Thus in a series of decisions beginning with the case of *Feres* v. *United States, supra,* the Court determined that an action cannot be maintained for service-connected injuries or death. The Court denied servicemen the right to sue the federal government under the Act where flagrant acts of negligent medical practice occurred. If the servicemen had been civilians, the patients would undoubtedly have been permitted to bring civil tort actions.

Succeeding Court decisions sustained that an action cannot be maintained in cases where injuries or deaths to servicemen were the outcome of an activity related to the service. *Baily* v. *De Quevedo,* 375 F.2d 72 (1962), cert. den. 389 US 923; *Baily* v. *Van Buskirt,* 345 F.2d 298, *Dilworth* v. *United States,* 387 F.2d 590.

In the case at bar injuries were inflicted on a civilian, the petitioner, by the negligent treatment given to her husband by Armed Forces personnel. The injuries suffered by the Petitioner, for which recovery is sought, were not ". . . incident to the service."

The decision rendered by the Court of Appeals indicates the servicemen's dependents are among the exceptions which Congress expressed were to be added to the general

waiver of the sovereign immunity of the Federal Tort Claims Act.

The nature of the exceptions of section 2680 of the Act is shown clearly in the history of the Seventy-Seventh Congress. The Seventy-Ninth, which passed the Act, integrated the hearings and language of the Seventy-Seventh Congress. It was stated before the House Committee on the Judiciary that "... It was not intended that the constitutionality of the legislation, the legality of regulations, or the propriety of a discretionary administrative act, should be tested through the medium of a damage suit for Tort." See *Dalehite* v. *United States*, 387 F.2d 590, 346 US 15 (1950).

A reading of the Act as a whole, with due regard to its purpose, reveals that Congress did not intend claims of servicemens' dependents among the exceptions to the Act. Uppermost in the mind of Congress was the ordinary common law torts. It was the desire of Congress to waive the Government's immunity from actions for injuries to person and property occasioned by the conduct of agents acting within their scope of employment.

A reading of the Feres Doctrine does not bar the claim of the Petitioner. The relationship between the Government and a servicemen's dependent is not incidental to service. The Petitioner, Aida Guzman, was not subject to military orders. She was neither serving the government nor on active duty.

The jurisprudential principle which applies to this case is that no action lies against the United States unless the legislature had authorized it. *Feres* v. *United States, supra.* If the purpose of the statute was to relax the rigor of the immunity rule, then the Court must not increase the restriction to servicemen's dependents.

In this case Petitioner is only seeking compensation for damages personally suffered as a result of the inadequate

medical treatment given to her husband. The claim is independent in spite of the fact that the origin of the damage arises from said treatment. Thus, the right to sue is not derived from the deceased's status as a soldier. See *Commercial Insurance Company* v. *Gonzalez Rivera,* 358 F.2d 480.

The Supreme Court stated in the prior case of *Brooks* v. *United States,* 337 US 49, that a serviceman can recover under the Federal Tort Claims Act when the injuries of the latter had nothing to do with the relationship to the military service. If a member of the Armed Forces can recover judgment against the United States under the Act for injury not incident to service, then the dependent should recover judgment as a result of an injury caused by the government.

The present case is a novel and difficult situation in which the United States Supreme Court should grant certiorari to determine the construction of the Act and the Feres Doctrine. The Court of Appeals contends that the incident to service limitation of the Feres Doctrine is binding in this case. The Petitioner respectfully believes that the Court of Appeals has misconceived the Doctrine when it finds said ruling controlling with regard to Petitioner's case.

The Supreme Court must render a far reaching and prudent decision which will be able to accommodate the Doctrine to the case at bar. There are legal as well as social ramifications in determining the nature of injuries and suffering received by a plaintiff who witnessed the negligent care given to her husband in an army hospital. Said injuries do not arise out of activity incident to service.

In *Messer* v. *United States,* 95 F. Supp. 512 (1951) it was decided that injuries sustained by a serviceman because of the negligent treatment given to his wife by Army

personnel was not incident to service and hence he was entitled to maintain an action upon these facts.

A Federal District Court in *Grigalauski* v. *United States,* 103 F. Supp. 543 (1951) allowed a serviceman's dependent to recover under the Federal Tort Claims Act. The dependent's injuries were caused by the inadequate care given by Army physicians.

In the present case injuries were inflicted on the Petitioner by the negligent treatment given to her husband. The issue presented by the Petitioner is of great importance and should be resolved definitely by this Court. It presents a new and difficult question which is different from the facts stated in the decisions relied upon by the Court of Appeals.

Conclusion

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 71-1124

AIDA GUZMAN DE FONT, ET AL.,

PLAINTIFFS, APPELLANTS,

v.

UNITED STATES OF AMERICA, ET AL.,

DEFENDANT, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Before COFFIN, *Circuit Judge,*
VAN OOSTERHOUT*, *Senior Circuit Judge,*
and STEPHENSON*, *Circuit Judge.*

Antonio Montalvo-Nazario, with whom *Segurola & Montalvo* was on brief, for appellant.

Morton Hollander, Attorney, Department of Justice, with whom *L. Patrick Gray, III*, Assistant Attorney General, *Julio Morales-Sanchez*, United States Attorney, and *Robert M. Feinson*, Attorney, Department of Justice, was on brief, for appellees.

January 6, 1972

Per Curiam. Plaintiffs appeal from dismissal of their complaint under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b), 2674) for damages sustained as a result of malpractice injury to their deceased husband and father. The trial court dismissed on the basis of *Feres* v. *United States,*

* Of the Eighth Circuit, sitting by designation.

340 U.S. 135 (1950). The complaint alleges that the treatment evaluation and medical care given decedent by various army physicians and hospitals was "deficient, negligent and unwarranted, causing extreme pain, mental disorder and anguish" to deceased and his wife, and that "plaintiffs have suffered the loss of companionship, the loss of father's ability to produce income and support to both plaintiffs, which are calculated in the amount of $884,000."

Initially, we observe that the plaintiffs, in opposition to the Government's motion to dismiss, contend *Feres* does not control because plaintiffs were not members of the Armed forces at the time of the negligent act and the injuries received by both plaintiffs did not arise out of, or in the course of, activity incident to service because both plaintiffs were civilians at the time the injuries and damages were suffered. Plaintiffs contend that as wife and child of decedent they have a separate and independent cause of action for mental suffering and anguish under the Civil Code of Puerto Rico. 31 L.P.R.A. § 5141. See *Commercial Union Insurance Company* v. *Gonzalez Rivera,* 358 F.2d 480, 482-3. (CA5 1966). The mere fact that the cause of action is not derivative under local law, but is an original and distinct cause of action granted to the heirs and personal representatives to recover damages sustained by them by reason of the wrongful death of the decedent, does not remove it from the prohibition of *Feres. Van Sickel* v. *United States,* 285 F.2d 87 (CA9 1960); *United States* v. *Lee,* 400 F.2d 558 (CA9 1968), *cert. denied,* 393 U.S. 1053 (1969). In *Feres,* at p. 143, the Supreme Court made it clear that an accident of geography would not be determinative of the applicable law. The controlling rule is that the Government is not liable under the Act "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service," *Feres* at p. 146.

In the case at hand, the damage claim for loss of "com-

panionship,'' ''father's ability to produce income and support to both plaintiffs'' is, under the allegations of the complaint, incident to decedent's service. On this basis the trial court was fully justified in dismissing the complaint. However, we further note that in appellant's brief and argument before this Court it is claimed that appellant wife ''was present throughout the treatment and witnessed and suffered the grave consequences of the inadequate care given to her husband.'' Although appellants' prayer for damages refers only to ''loss of companionship'' and to loss of the decedent's ''ability to produce income,'' appellants also apparently raise some claim of a separate and independent tort to the wife based on mental anguish arising from her observations of the inadequate care given her deceased husband. *See* Prosser, The Law of Torts, 181 (2d ed. 1955). Even if this claim were adequately specified and damages claimed therefor, we are satisfied that this allegation would not remove the incident-to-service limitation of *Feres*. We would be unwilling to depart therefrom even if we were able to do so. *Cf. Hall* v. *United States*, . . . F.2d . . . (1st Cir. Nov. 18, 1971, No. 71-1230).

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

Civil No. 946-70

AIDA GUZMAN DE FONT, FOR HERSELF AND AS MOTHER WITH PATRIA POTESTAS OF MINOR JACKELINE FONT GUZMAN,
PLAINTIFF,

v.

UNITED STATES OF AMERICA, UNITED STATES ARMY,
DEFENDANTS.

ORDER

On February 4, 1971 a hearing was held on defendant's motion to dismiss complaint and plaintiff's opposition thereto. Antonio Montalvo Nazario, Esquire, appeared on behalf of plaintiff, and Wally de la Rosa, Assistant U. S. Attorney, appeared representing the United States Government.

After hearing arguments in favor and against by the appearing parties, and being duly advised in the premises, this Court finds that defendant's motion to dismiss is well-taken as the complaint clearly falls within the doctrine of the *Feres* v. *United States* case, 340 U.S. 135, in that the deceased in the present case, Vicente Font Carrion, was an enlisted man in the U.S. Army and the Government is clearly not liable under the Federal Tort Claims Act for injuries which arise out of or are in the course of activities incident to service. *Dilworth* v. *U. S.*, 337 F.2d 590 (1 Cir. 1967); *Bailey* v. *DeQuevedo*, 375 F.2d 73, 74 (3 Cir. 1967), cert. den. 389 U.S. 923; *Bailey* v. *K. E. Van Buskirk*, 345 F.2d 298, (9 Cir. 1965); *Schults* v. *U. S.*, 421 F.2d 170 (5 Cir. 1969); *Van Sickel* v. *U. S.*, 285 F.2d 87 (CA 9, 1960).

It is therefore ORDERED, ADJUDGED AND DECREED that the complaint herein be and it is hereby DISMISSED.

San Juan, Puerto Rico, March 5, 1971.

(s) JUAN B. FERNANDEZ BADILLO
JUAN B. FERNANDEZ BADILLO
United States District Judge